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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-908

SAUL E. JOFTES, *Petitioner*

v.

WILLIAM A. WEXLER and B'NAI B'RITH, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	10
Conclusion	14
Appendix A—Memorandum Opinion of District Court for the District of Columbia, Gesell, Judge, in *Joftes* v. *Kaufman* and *Joftes* v. *Wexler and B'nai B'rith*, C.A. 3271-67 and 216-69, dated January 15, 1971 and reported in 324 F. Supp. 660	1a
Appendix B—Judgment of the Court of Appeals in this case, unreported	9a
Appendix C—Memorandum-Order of District Court for the District of Columbia, Gasch, Judge, in *Joftes* v. *B'nai B'rith*, C.A. No. 2561-68, dated March 3, 1969, unreported	10a
Appendix D—Memorandum of District Court for the District of Columbia, Gesell, Judge, in *Joftes* v. *Kaufman*, C.A. No. 768-68, dated November 1, 1971, unreported	13a

INDEX OF CITATIONS

CASES:

Joftes v. B'nai B'rith, DCDC No. 2561-68, aff'd No. 23,067 U.S. App. D.C., cert. den. 400 U.S. 964	5, 6, 9, 11
Joftes v. Kaufman, DCDC No. 768-68	5, 9
Linn v. United Plant Guard Workers of America (1966), 383 U.S. 53	13
NLRB v. Granite State Joint Board of Textile Workers Union of America (Dec. 7, 1972), 41 LW 4074	11, 12
Republic Steel Corp. v. Maddox (1965), 379 U.S. 650	7
San Diego Building Trades Council v. Garmon (1959), 359 U.S. 236	13

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Saul E. Joftes, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on September 26, 1972.

OPINIONS BELOW

The opinion of Judge Gesell of the U.S. District Court for the District of Columbia granting defendants' motion for summary judgment in this libel case, which appears in Appendix A, *infra*, is reported in 324 F. Supp. 660. The Court of Appeals for the Dis-

trict of Columbia Circuit affirmed *per curiam* without opinion. Its judgment, which appears in Appendix B, *infra*, is unreported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was made and entered on September 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Did the Courts below err in holding that petitioner, by joining B'nai B'rith's Staff Association, had consented to the publication of the libel in the letter dispatched and circulated by his former employers six weeks after they had fired him thus terminating his membership in the Staff Association?

Did the Courts below err in holding that petitioner could not maintain an action for libel against his former employers who had libeled him in a letter received by him six weeks after those employers had fired him and he had accepted the dismissal, and that he was restricted to either a grievance proceeding provided for in an Agreement between his former employers and their Staff Association to which he had once belonged or to an action for wrongful discharge?

Did the Courts below err in holding that the authors of a libelous letter, received by petitioner and circulated six weeks after they had fired him, were protected by an absolute privilege?

Did the Courts below err in holding that the libelous letter sued upon was a "notice of dismissal" contemplated by the Agreement, when another Judge of the

same District Court, in an earlier case between petitioner and respondent B'nai B'rith, of which respondent Wexler was President, had held that it was not, and the Court of Appeals for the District of Columbia Circuit had affirmed and this Court had denied a petition for certiorari?

STATEMENT

This is an action for damages for libel against B'nai B'rith and its one time President. The facts necessary to place the questions now raised in their proper setting, can be briefly stated, as follows:

As of January 5, 1968, petitioner Saul E. Joftes had been a top executive employee of B'nai B'rith for over twenty years. Many of those years had been spent building B'nai B'rith in Europe and Latin America but, from the time of its creation in May of 1959 until February 20, 1967, he had been first Secretary and then Secretary-General of the B'nai B'rith International Council. He had an office in Washington and belonged to a company union type organization open only to executive employees of B'nai B'rith, called the Headquarters Staff Association, which had a "collective bargaining agreement" with B'nai B'rith. This Agreement provided that a member could be fired for "gross personal misconduct", in which case he would be entitled to "severance pay"; or he could be fired for "malfeasance, misfeasance and nonfeasance", in which case he would not be entitled to "severance pay". In early 1967, the then recently installed, Zionist oriented, administration of B'nai B'rith, having decided that petitioner was in disagreement with them as to the proper function of the International Council, vis a vis the international relations of the United States, sent him two circulated letters of dismissal signed by the

new Executive Vice-President, Rabbi Jay Kaufman. Joftes immediately invoked the grievance procedure provided for in the Agreement between B'nai B'rith and its Staff Association but a compromise was worked out under which Joftes was to be appointed to a newly created position of Director of Research for B'nai B'rith and the Rabbi was to withdraw charges of incompetence, malfeasance, misfeasance and nonfeasance which he had made in the circulated letters of dismissal sent to Joftes on January 6 and February 20, 1967. Joftes accepted the Directorship and waited a year for a retraction which was never made. On December 28, 1967, he filed a suit for damages for the libel in the two letters, naming the Executive Vice-President as the defendant.

Respondent Wexler reacted promptly in a letter dated and delivered to petitioner on January 5, 1968, and face to face with him on the same day, by firing Joftes summarily because, he said in the letter, Joftes had been guilty of "gross personal misconduct" when he filed the libel suit against the Executive Vice-President. Joftes, obviously wearied by the three year ideological struggle with Wexler and Kaufman, accepted this dismissal. This time he did not invoke the provided for grievance procedure. He did not file an action for wrongful discharge. He filed no appeal to his superiors and offered no compromise but, having "freely chosen to exercise his legal right to abandon the privileges of union membership", he, on the day of the firing, asked only for the return of his contributions to the employees' pension fund which he had the right to do when he left B'nai B'rith and the Staff Association, and for payment of the money, the right to which vested in him under the provisions of the Agreement between B'nai B'rith and the Staff Asso-

ciation, as an employee who had accepted dismissal for "gross personal misconduct". (See *Joftes* v. *B'nai B'rith*, DCDC No. 2561-68, Appendix C, *infra*, aff'd without opinion U.S.App.D.C. No. 23,067, cert den. 400 U.S. 964). The President of B'nai B'rith, on the same day in Joftes' presence, directed his Comptroller to compute the amounts due Joftes and make the payments. President Wexler then went to Europe and did not return to Washington, D.C. until February 10, 1968.

After the President of B'nai B'rith had left the country, the Executive Vice-President countermanded President Wexler's specific instructions by arbitrarily directing the Comptroller to withhold payment of the money. (See unreported opinion in *Joftes* v. *Kaufman*, DCDC No. 768-68, decided November 1, 1971 by Judge Gesell, sitting without a jury, and unappealed, Appendix D, *infra*). Later, various personnel of B'nai B'rith, including President Wexler and Executive Vice-President Kaufman, met with their lawyer in Washington on February 11, 1968 to discuss Joftes and plan litigation strategy. Immediately after this meeting, President Wexler, in a complete about-face from the position he had taken on January 5 and in a patent calculated ploy to deprive Joftes of the money due him as a result of the January 5 action, sent Joftes an unsoliciated letter dated February 14, signed by Wexler and admittedly circulated to others, telling Joftes and the others that Joftes had been fired for some unidentified "malfeasance, misfeasance and nonfeasance", committed at some unspecified time in some undisclosed capacity. Joftes sought, unsuccessfully, for almost a year to have the B'nai B'rith President retract that unnecessary, unsubstantiated, disgraceful charge

that left Joftes' 20 year record of achievement for B'nai B'rith a shambles.

In the meantime, when the money due him under the Agreement and President Wexler's original instructions had not been paid, Joftes, faced with Wexler's perfidy and fully aware of the activities of the Executive Vice-President, sued the latter on March 27, 1968 for tortiously interfering with his contract rights. B'nai B'rith returned Joftes' pension money in June of 1968 but continued to ignore his demands for "severance pay", so. on October 14, 1968, he brought suit against B'nai B'rith (*Joftes* v. *B'nai B'rith*, No. 2561-68, *supra*), for the money which became due him under the "union" agreement when the President fired him for "gross personal misconduct". The District Court, in an unpublished opinion by Judge Gasch, granted Joftes' motion for summary judgment in No. 2561-68, filed a "Memorandum-Order" on March 3, 1969 (Appendix C, *infra*) and an Order on Judgment was docketed March 24, 1969. In his Memorandum-Order, Judge Gasch spelled the issue out clearly: If the January 5 "misconduct" letter was the "notice of dismissal", Joftes was entitled under the terms of the Agreement to summary judgment for the money claimed but, if the February 14 "malfeasance" letter was the "notice of dismissal", Joftes was entitled to no money. The Judge held with plaintiff Joftes that the January 5 letter, not the February 14 letter, was the "notice of dismissal." The Judge said that the true reasons for dismissal had been set forth "clearly and unambiguously" in the January 5 letter, and that that being so, Joftes was entitled to severance pay, payment of a lump sum in lieu of notice of intent to dismiss, and a lump sum for accumulated annual vacation time. Judg-

ment for over $25,000.00 was entered accordingly. Defendant B'nai B'rith perfected an appeal from this decision, relying almost exclusively upon *Republic Steel Corp.* v. *Maddox* (1965) 379 U.S. 650. The Court of Appeals for the District of Columbia Circuit affirmed on June 24, 1970 (No. 23,067) *per curiam* and without opinion and this Court denied certiorari on December 21, 1970 (400 U.S. 964).

In the meantime, after his year-long efforts to elicit a retraction of the charges in Dr. Wexler's February 14 letter had failed, Joftes, on January 28, 1969, filed an action against Dr. Wexler and B'nai B'rith (the instant case) for damages for libel. The two libel suits, against Kaufman and Wexler, and the interference case were assigned to Judge Gesell. Counsel for plaintiff proceeded methodically in the three cases to make full use of the discovery procedures provided for in the Federal Rules of Civil Procedure. On May 28, 1970, Judge Gesell, acting upon plaintiff's opposed motion for entry of default against defendant Wexler in No. 216-69 for wilful failure to answer interrogatories propounded to him, signed an order striking Wexler's pleadings and entered a default against him. Defendant Wexler moved for reconsideration of that action. Plaintiff continued with discovery. The default matter lay dormant until October 20, 1970 when Judge Gesell vacated the default he had entered, radically curtailed plaintiff's right to discovery and, in effect, directed defendants Wexler and B'nai B'rith to file motions for summary judgment, expressing an interest only in the extent of publication of what he called the "notice of discharge bearing date of the 14th of February 1968". The motion was filed; plaintiff opposed it but did not counter-move, and, on January 15, 1971, almost two years after Judge Gasch's decision, Judge

Gesell granted defendants' motions in the two libel suits. He filed a Memorandum Opinion in which, *sua sponte*, he combined the two libel cases. In it he held that:

> "Notices of dismissal for cause which are contemplated by a collective bargaining agreement and which are published by the employer only to those with a legitimate interest in the subject matter may not be made the subject of an action for libel, regardless of whether the allegations of cause are true or false and regardless of the actual motive behind the dismissal."

He said that "This principle finds ample support in the law and requires that summary judgment be entered for defendants as to each cause of action". He based his legal conclusions upon his findings:

1. That the February 14, 1968 "malfeasance" letter was the "notice of dismissal".

2. That Joftes had consented to publication of the libelous language in the February 14 letter when he joined the B'nai B'rith Staff Association, and was, on February 14, 1968 six weeks after having been fired, still bound by that consent.

3. That under federal labor law, Joftes' only remedies were under the grievance procedure provided for in the Agreement or by a complaint for wrongful discharge.

4. That the authors of the February 14 letter were protected by an absolute privilege.

Joftes perfected appeals in both cases. Appellee Kaufman died on August 15, 1971 and the appeal in *Joftes* v. *Kaufman*, No. 71-1295 U.S.App. D.C. was dismissed as abated. On September 26, 1972, the Court

of Appeals for the District of Columbia Circuit affirmed in *Joftes v. Wexler and B'nai B'rith*, the instant case, *per curiam* and without opinion. See Appendix B, *infra*.

In the meantime, *Joftes* v. *Kaufman*, No. 768-68 for interference with Joftes' contract rights was tried before Judge Gesell without a jury and, on November 1, 1971, he filed a Memorandum in which he granted judgment to plaintiff on a holding that:

> "* * *. The failure after explicit demand to pay items (2), (3) and (4) [$20,000—severance pay; $1,666.66—in lieu of notice; $3,076.80—accumulated vacation] prior to this law suit as provided in the agreement between B'nai B'rith and its Headquarters Staff Association (Pl. Ex. 11) of which plaintiff was a member, was substantially the result of and was proximately caused by defendant's effective interference in the absence of Wexler who had taken personal responsibility for all phases of the matter. Defendant countermanded Wexler's specific instruction by arbitrarily directing the comptroller to withhold payment. This was done in Wexler's absence with full knowledge of Wexler's instructions and plaintiff's right to the sums as indicated above. There were no legal difficulties holding up payment at that time, although some legal questions arose later, and the Court has concluded that defendant acted out of personal pique and not by reason of any duty imposed upon him. Defendant thus substantially interfered with plaintiff's contractual rights to notice, severance and vacation allowance which President Wexler had determined vested in plaintiff at the time of discharge. * * *".

A notice of appeal was filed for Kaufman's personal representative but was later withdrawn.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit has decided questions of general importance and application in which it did not give proper effect to applicable decision of this Court, and, in at least one instance, has so far sanctioned a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Application of the doctrine of res judicata is the accepted and usual course in judicial proceedings, yet the District Court failed and the Court of Appeals refused to apply that doctrine to the question of whether the February 14 "malfeasance" letter was a "notice of dismissal". It is submitted that this issue was the controlling one in Joftes' successful suit against B'nai B'rith for severance pay; that Judge Gasch had decided that the January 5 "misconduct" letter was the "notice of dismissal" and the District Court and the Court of Appeals should have acknowledged that they were bound by that decision. This Court has said too many times to require documentation that an existing final judgment rendered upon its merits without fraud or collusion by a court of competent jurisdiction is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. The doctrine precludes the relitigation of the same facts or issues in a subsequent action or a different cause of action. For the purposes of the rule of res judicata, "parties" has been defined to include all persons who have a direct interest in the subject matter of the action and have a right to control the proceedings, defend, examine witnesses, and appeal, if an appeal lies. Under these

definitions, B'nai B'rith certainly, and President Wexler assuredly, were bound by Judge Gasch's decision in *Joftes* v. *B'nai B'rith, supra,* and it was error on the part of the District Court and the Court of Appeals to allow relitigation and a change in the results established by Judge Gasch. This Court should exercise its power of supervision to prevent what could be an erosion of the long established substantive rule.

It seems rather obvious that the cornerstone of Judge Gesell's opinion is his finding that the February 14 "malfeasance" letter was a "notice of discharge". Remove this corner-stone and the structure he created upon it comes tumbling down. Proper application of the rule of res judicata by either of the two lower courts would have removed the corner-stone. But, having decided that the February 14 letter was the "notice of discharge", Judge Gesell then compounded his error by deciding that petitioner had given his consent to publication of the libel since, he said, the "notice of dismissal" was contemplated by the agreement between B'nai B'rith and its Staff Association. Noting again that the February 14 letter was not a "notice of dismissal", it is submitted that the Court again erred in holding in this case what he later refuted in the interference case, that on February 14, 1968, six weeks after he had been fired, petitioner was still bound by implied provisions of that Agreement. Such a decision that petitioner remained bound by implied consent provisions of the Agreement between B'nai B'rith and its Staff Association six weeks after he had been fired for a stated cause, with a concomitant termination of his membership in the Association, is in direct conflict with the decision of this Court in *NLRB* v. *Granite State Joint Board of Textile Workers Union of America*, Case No. 71-711, decided December 7, 1972, 41 LW

4074, or, if not, is certainly in conflict with the principle established by this Court in that decision. This Court there held that "when a member [of a union] lawfully resigns from the union, its power over him ends". If this principle were followed in the instant case, then, when petitioner ceased to be a member of the "union", he was no longer bound by any of the provisions or implications of the Agreement between his former employer and his former union. To hold differently, holds that the mere fact that petitioner once had been a member of the Staff Association, which had an agreement with his former employer, would give the employer the right in perpetuity to circulate libelous letters about petitioner simply by mis-labeling them letters of charges.

Should it not be said here that when there is a lawful dissolution of a union-member relation by dismissal, the union agreement with the employer has no more application to the former member than it has to the the man on the street? Petitioner had accepted the finality of his dismissal on January 5, 1968. He had said, give me my money and I'll be on my way. Respondent Wexler had said to his Comptroller, see to it that he gets it. Then the Executive Vice-President took over and, with Wexler as the avowed author, the February 14 "malfeasance" letter was circulated. This Court should grant the petition for certiorari and augment what the Chief Justice said in the *Granite State* case by saying: "Where the individual employee has freely chosen to exercise his right to abandon the privileges of union membership [by accepting discharge from the employment upon which his membership was conditioned], it is not for us [or any court] to impose the obligations of continued membership [in behalf of the employer to the detriment of the employee]".

But the District Court, having decided that the "malfeasance" letter was the "notice of dismissal" and that petitioner had given his consent to the publication of it, again erred by saying that petitioner is not allowed to sue for damages for libel but must be restricted to some other procedure such as an available, but optional, grievance procedure or a suit for wrongful discharge, notwithstanding the fact that Joftes had "freely chosen to exercise his legal right to abandon the privileges of membership". This District Court decision was in direct conflict with the decisions of this Court in *Linn* v. *United Plant Guard Workers of America* (1966) 383 U.S. 53 and *San Diego Building Trades Council* v. *Garmon* (1959), 359 U.S. 236, or at least the general principle stated in the instant case is in conflict with the principle established by this Court in the *Linn* and *Garmon* cases. The question of the exclusiveness of remedy for libel committed in labor or quasi-labor cases was recognized by this Court in those cases as a recurring one. The Court has expressed a concern over the possibility of transgressions of libel actions upon the national labor policy. That possibility is involved here as it was in *Linn* and *Garmon*. This Court did not apply *Republic Steel Corp.* v. *Maddox, supra,* to the facts in *Linn* as the District Court did in the instant case. The petition in this case should be granted for exactly the same reasons and considerations as prompted the Court to grant certiorari in the *Linn* case. It is submitted that the instant case "fits within the exception [to a preemption tendency] specifically carved out by Garmon". The District Court, in the instant case, has said that national labor policy has completely preempted the field of injury during disputes over a labor question. This Court held to the contrary in *Linn* and indicated that

it would reconsider the holding if some court in the future should hold that "a more complete curtailment seemed necessary." The District Court has so held, and the Court of Appeals has approved, in the instant case and certiorari should be granted to review that holding.

Finally, the opinion and decision of the District Court as affirmed without opinion by the Court of Appeals that the corporate and individual authors of the libelous letter were protected by an absolute privilege is in direct conflict with the decision of this Court in *Linn, supra,* wherein it was held that the privilege, where one exists, is only a qualified one to be defeated by pleading and proving malice and damages.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted, the judgment vacated and the case remanded for further proceedings.

Respectfully Submitted,

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APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3271–67

SAUL E. JOFTES, *Plaintiff*,

v.

RABBI JAY KAUFMAN, *Defendant*.

Civil Action No. 216–69

SAUL E. JOFTES, *Plaintiff*,

v.

WILLIAM A. WEXLER, ET AL., *Defendants*.

Memorandum Opinion

These two libel actions arise out of the circumstances surrounding the dismissal of plaintiff Saul Joftes from his position as an officer of B'nai B'rith, Inc. In Civil Action No. 327–67, Joftes sues Rabbi Jay Kaufman, Executive Vice-President of B'nai B'rith, for allegedly libelous statements made in two letters of January 6 and February 20, 1967. In Civil Action No. 216–69, Joftes sues B'nai B'rith and its President, Dr. William A. Wexler, for similar statements made in a letter of February 14, 1968. Excessive discovery has been conducted in each case. Oral argument was heard on defendant's motion for summary judgment in 3271-67, and the parties were invited to submit affidavits concerning the extent of publication of the letters. Defendants in 216-69 have since also moved for summary judgment, and as the two cases arise on similar facts and involve common questions of law, the Court will deal with them in a single Memorandum.

Though the background of these cases is as complicated as might be expected where the precipitating event was a falling out among formerly close associates in an enterprise

of international scope and political significance, the relevant facts may be briefly stated.

Saul Joftes was until January of 1967 the Director General of the B'nai B'rith International Council, working under Rabbi Kaufman and President Wexler, among others. In late 1966, Rabbi Kaufman, in consultation with other officers of the organization, decided for various reasons to terminate the employment of Joftes. When efforts to secure his resignation proved unsuccessful, Rabbi Kaufman informed Joftes that he was discharged, and dictated to his secretary a letter confirming this fact. The letter, dated January 6, 1967, stated that "The cause of your separation is your lack of capacity and competence to handle the position of Secretary-General," and detailed three general areas in which Joftes' superiors were dissatisfied with his performance. Accompanying this personal letter was a memorandum also addressed to Joftes, urging that he resign rather than accept involuntary dismissal.

Upon being handed this letter and memorandum, Joftes consulted with Albert Z. Elkes, President of the B'nai B'rith Headquarters Staff Association, a union of which Joftes was a member. Elkes communicated to the officers of the organization that Joftes had invoked the grievance procedures of the collective bargaining agreement, and requested a bill of particulars in support of the dismissal for cause. In the course of handling the Joftes matter, Rabbi Kaufman on February 20 dictated and sent to Joftes a "supplemental notice" of discharge, stating in part: "In addition to the causes for termination based on incompetence of a continuing nature as stated in the above letter, you are dismissed from employment on the further grounds of malfeasance, misfeasance and nonfeasance."

After this letter had been sent to Joftes, the parties again sought to resolve the dispute short of utilizing the grievance machinery, and in March of 1967 reached a seemingly acceptable compromise. Joftes was to continue his employ-

ment with B'nai B'rith in the position of Director of Research, at the same salary. The notice of discharge was rescinded, and the parties coexisted until December of 1967, when Joftes filed Civil Action 3271-67 against Rabbi Kaufman. This event precipitated Joftes' final discharge from the organization, which this time was communicated to him by President Wexler in a letter of January 5, 1968. Joftes shortly thereafter made a written demand upon Joseph Sklover, Comptroller of B'nai B'rith, for sums claiming to be due him under his contract. (This dispute later became the subject of Civil Action No. 2561-68 in which severance pay was awarded to Joftes and the award affirmed on appeal.) In response to this demand, Wexler dictated a letter dated February 14, 1968, which has become the subject of Civil Action 216-69. The allegedly libelous portion of this letter is as follows: ". . . your dismissal dated January 5, 1968, was by reason of misconduct, constituting 'malfeasance, misfeasance, and nonfeasance. . . . '"

Affidavits submitted by defendant established that Rabbi Kaufman's letters of January 6 and February 20, 1967, were published only to the following persons: Miss Edith Miller, Kaufman's secretary who typed the letters after they were dictated to her; President Wexler, Albert Elkes, President of the Staff Association; Maurice Weinstein, Chairman of the B'nai B'rith International Council and hence Joftes' immediate superior in the organization; Joseph Sklover, Comptroller of B'nai B'rith; and various attorneys associated with the firm which is counsel to defendant in these cases. President Wexler's letter of February 14, 1968, was published to these same persons with the exception of Elkes and Weinstein; and also to Mrs. Hannah Sinauer, secretary to Wexler, who was shown a copy to enable her to respond to a subpoena served upon her by Joftes in one of the lawsuits brought by him. This letter was also seen by plaintiff's wife, who opened the letter mailed to Joftes at his home address.

Central to the legal arguments of defendants is the collective bargaining agreement between B'nai B'rith and the Staff Association. Article VII of that agreement provides in part:

> (1) A regular employee may be dismissed from employment only on the grounds of malfeasance, misfeasance, nonfeasance (including incompetence of a continuing nature), or gross personal misconduct not connected with his official duties but of such a nature as to make his continuing employment a detriment to the purposes of B'nai B'rith.
>
> (2) . . .
>
> d. In all cases, the notice of dismissal or evaluation shall be in writing.

Article XVIII of the agreeement establishes a grievance procedure by which an employee may contest his dismissal, provided he invokes the procedure within one week of his receipt of written notice of discharge.

Defendant contends that the existence of this agreement bars any action by Joftes based on the three letters in question. It is argued first that Joftes consented to the publication of each letter by virtue of his membership in the union whose agreement with B'nai B'rith required written notice of dismissal for cause; second, that under federal labor law the grievance procedure specified in the agreement is the exclusive remedy for any cause of action based on a notice of discharge; and finally, that the terms of the agreement establish an absolute privilege for the issuance of each of the three letters.

All these arguments point in the direction of one principle: that notices of dismissal for cause which are contemplated by a collective bargaining agreement and which are published by the employer only to those with a legitimate interest in the subject matter may not be made the subject of an action in libel, regardless of whether the allegations of cause are true or false and regardless of the

actual motive behind the dismissal.[1] This principle finds ample support in the law and requires that summary judgment be entered for defendants as to each cause of action.

That each of the documents at issue were contemplated by the collective bargaining agreement cannot be doubted. None of the letters made specific allegations or stated any causes for dismissal beyond the words stated in the agreement—*i.e.*, "misconduct," "incompetence," or "malfeasance, misfeasance, and nonfeasance"—with the single exception of Rabbi Kaufman's letter of January 6, where the statement of cause in its entirety was as follows:

> The cause of your separation is your lack of capacity and competence to handle the position of Secretary-General. The repeated requests of Mr. Winstein to have ample communication with the members of the International Council through *The Courier* have not been met by you. We realize that you were unable to create this and other vehicles of communication such as are regarded as indispensible [sic]. The desire for you to establish relations with the staff so that there would be a cooperative effort and a channeling of aid from the various commissions and committees into the overseas Districts was not undertaken [sic] by you, because of your inability to establish a rapport with members of the staff. Repeated requests for you to

---

[1] Although the possibility of malice is not precluded by the papers submitted in support of the motion for summary judgment (see Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)), the Court notes that any evidence of malice is exceedingly slim. Discovery in these cases leaves little doubt that the source of difficulty between Joftes and the other officers for B'nai B'rith lay in disagreements over the organization's political activities, and that these differences led to Joftes' inability to work effectively with Rabbi Kaufman and others. The fact that these circumstances may not have been adequate cause for termination under the staff agreement does not establish the existence of malice in the notices of dismissal. Tending to show the absence of malice is the lack of any vituperation or wholly unfounded charges in the letters, and also the attempts of defendants to keep the dispute within the organization—attempts successfully frustrated by Joftes' conduct since the time of his discharge.

> relate properly to the ADL personnel in order to set up a Human-Relations operation in South America were ignored by you and non-communicative and belligerent relations continued so that the entire endeavor had to be consummated without you.

Whether or not these claims of incompetence were just, and whether or not they were the true reasons for the discharge, each was directly related to Joftes' handling of his job and none went further than to state possible reasons for the employer's dissatisfaction with his performance.

Moreover, each letter was occasioned by a development relating to the dismissal. Rabbi Kaufman's January 6 letter was the official written notice of the 1967 discharge; his "supplemental notice" of February 20, adding "malfeasance, misfeasance, and nonfeasance" to the stated reasons for the dismissal, was written to clarify what appeared to be a breach of the agreement, since dismissals simply for "incompetence" had to be preceded by a written evaluation and an opportunity for the employee to improve his performance. President Wexler's letter of February 14, 1968, was written in response to a demand by Joftes for severance pay, and the recitation of cause for the dismissal was made because the reasons for discharge controlled the employee's entitlement to severance pay under Article XVII of the agreement.

Though the Court has found no precedent precisely in point, settled principles in the law of defamation support an absolute privilege for the letters in question. The publication even of a malicious libel is absolutely privileged if the person defamed consents thereto. *Restatement of Torts* § 583 (1938). In Comment (d) to § 583, the authors of the Restatement in discussing the law of absolute privilege draw attention to an analogous situation:

> Moreover, one who agrees to submit his conduct to investigation knowing that its results will be published, consents to the publication of the honest findings of the investigators. Such a consent may be derived from voluntary membership in an association, the rules of which provide for an investigation. . . .

By virtue of his membership in the Staff Association, Joftes had consented to a written statement of cause in the event of his dismissal. Whatever may be his remedies for an unjust dismissal, they certainly do not include an action in libel based on the letters announcing it.

To hold the contrary would bring the law of defamation into serious conflict with principles governing employment relations. In *General Motors Corp.* v. *Mendicki*, 367 F.2d 66 (10th Cir. 1966), the court held that the national labor policy protected statements made in the course of a grievance proceeding from being made the basis of a libel suit.

> It is our conclusion that statements made either by representatives of management or by representatives of an employee at a conference or bargaining session having for its purpose the adjustment of a grievance of the employee or other peacable disposition of such grievance are unqualifiedly privileged. (367 F.2d at 70).[2]

This holding does not conflict with *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), where the Court held that the Labor-Management Relations Act did not bar a defamation suit under state law by a company official against the union for statements made about him in the course of a union organizing campaign. The rationale of the Court's decision was that the remedial provisions of labor law offered no possibility of relief for the injury allegedly suffered by the official. 383 U.S. at 63. Here, on the other hand, Joftes had available to him an opportunity through the grievance machinery to secure personal relief and vindication, and by way of an action for wrongful discharges if the grievance procedure were held not to be an exclusive remedy under the terms of the agreement. To allow him to proceed

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[2] To the extent that Henthorn v. Western Maryland Ry. Co., entitled only to a privilege, it is in conflict with the better rule 226 Md. 499, 174 A.2d 175 (1961), holds that such statements are entitled only to a qualified privilege, it is in conflict with the better rule in the later *Mendicki* case.

instead by way of a burdensome, expensive, vexatious libel suit against individuals who did no more than fulfill their duty to inform him of reasons for his dicharge would indeed be subversive of the carefully constructed system of procedures and remedies for employment disputes. *See Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), where in deciding that a failure to utilize a contractual grievance procedure to contest an involuntary dismissal barred the employee from maintaining a lawsuit for wrongful discharge, the Court noted:

> A contrary rule which would permit an employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. (379 U.S. at 653).

The grounds for the privilege, of course, do not exist where the employer publishes the notice containing the grounds for dismissal to persons without a legitimate job-related interest in receiving it. There was no such excessive publication in these cases. It requires no discussion to hold that all recipients of each letter were within the scope of its justified distribution, with the exception of Joftes' wife who saw Wexler's letter through no fault of defendants. Plaintiff asserts that there is a genuine issue of fact as to whether others may have seen one or more of the letters, but he has offered no proof, by way of affidavit or otherwise, to contradict defendants' unqualified denials. None of plaintiff's other asserted "genuine issues" are material in these cases.

Defendants' Motion for a Protective Order in Civil Action 216-69 is denied. The foregoing Memorandum Opinion shall constitute the Court's findings of fact and conclusions of law. Counsel shall submit orders within one week granting summary judgment for all defendants in both cases.

GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

January 15, 1971.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

Civil Action 216–69

No 71–1294

Saul E. Joftes, *Appellant*

v.

William A. Wexler, et al., *Defendant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

BEFORE: TAMM, CIRCUIT JUDGE, WADE H. MCCREE, JR.,[3] CIRCUIT JUDGE FOR THE SIXTH CIRCUIT, AND MACKINNON, CIRCUIT JUDGE

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed. See *Joftes* v. *Kaufman, et al.,* 324 F.Supp. 660 (D.D.C. 1971).

PER CURIAM

[3] Sitting by designation pursuant to Title 28, U.S.C. §291(a).

Jyfunle, 26.1972

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2561–68

Saul E. Joftes, *Plaintiff*,

v.

B'nai B'rith, Inc., *Defendant*.

Memorandum—Order

This matter came on for hearing on plaintiff's motion for a summary judgment of its complaint for benefits under a contract of employment. It appears that there is no genuine issue as to the material facts.

Plaintiff was employed by B'nai B'rith for more than twenty years. As of January 5, 1968, an agreement existed between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association which governed the rights and duties of plaintiff and defendant concerning employment and discharge. Under articles VII and XVII of the agreement, an employee could be dismissed for either "malfeasance, misfeasance or nonfeasance (including incompetence of a continuing nature), or gross personal misconduct not connected with his official duties but of such a nature as to make his continuing employment a detriment to the purposes of B'nai B'rith." If an employee were discharged for the former reason, he would not be entitled to severance pay. If, however, he were discharged for "gross personal misconduct," he would be entitled under a particular formula to as much as one year's salary in severance pay.

In 1967, after notice and discussion, B'nai B'rith discharged plaintiff for "malfeasance, misfeasance and nonfeasance." He was and in defendant's words "had been for some time a thorn in the side of the organization." Plaintiff appealed to his superiors to reconsider and after further

discussions they agreed to retain him "in another capacity out of an act of compasion and charity."

Subsequently, plaintiff filed a law suit against Rabbi Kaufman. When on January 5, 1968, his superior, Dr. William Wexler, learned of the suit, plaintiff was notified by phone that he was dismissed. Pursuant to the applicable agreement, he was notified that same day by letter from Dr. Wexler that he was dismissed from his employment for "gross personal misconduct of such a nature as to make your continuing employment a detriment to the purposes of B'nai B'rith."

On February 14, 1968, Dr. Wexler mailed to plaintiff a second letter which purported to clear up any confusion as to the first letter and which stated that plaintiff was discharged for "malfeasance, misfeasance, and nonfeasance." Defendant contends that it has raised a genuine issue of material fact as to the intent of Dr. Wexler when he fired the plaintiff. The Court disagrees.

Defendant's second letter to plaintiff purporting to amplify the reasons for discharge was mailed about five weeks after the dismissal of plaintiff. The reasons for the dismissal are set forth clearly and unambiguously in the letter of January 5th. Under the employment agreement (Art. VII, ¶2d), reasons for dismissal must be stated in writing.

Defendant says the actual reasons for dismissal are set forth in the second letter dated five weeks after action was effected. If plaintiff were dismissed for the reasons stated in the second letter, he would be entitled to no severance pay. Defendant also takes the position that plaintiff's work had not been satisfactory for some time and that inferences should be drawn from the first letter as explained by the second letter that the actual reason for the dismissal was "malfeasance, misfeasance and nonfeasance" which would not entitle plaintiff to severance pay under the agreement.

It is noteworthy that the letter of January 5, 1968, quotes precisely the language of the agreement concerning the firing for gross personal misconduct. It is clear and unambiguous.

Thus, the only question in the case is not one of fact or inference and not one which would appropriately be submitted to a jury. It is merely whether the filing of the law suit, an act not logically connected with the employment and an act which admittedly precipitated the discharge, was "gross personal misconduct" as described in the letter of January 5, 1968, or whether it may be considered as a continuation of the "malfeasance, misfeasance and nonfeasance" which had earlier troubled the organization.

Dr. Wexler, President of the organization, upon being advised of the pendency of the law suit dismissed plaintiff and as required by the contract, stated the reasons in writing. The stated reasons entitled plaintiff to severance pay under the agreement. Under the circumstances, the Court would not be justified in reading into the letter which effected the decision an intent which is not expressed therein. In oral argument, counsel with commendable candor stated that Dr. Wexler's choice of language was deliberate because on a prior occasion when he used the words "malfeasance, misfeasance and nonfeasance," plaintiff filed a law suit.

Plaintiff's motion for summary judgment is granted.

Order accordingly.

/s/ Oliver Gasch
Judge

Date March 3, 1969

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 768–68

Saul E. Joftes, *Plaintiff*,

v.

Rabbi Jay Kaufman, *Defendant*.

Memorandum

This is an action for tortious interference with contract. Plaintiff was Director of Research of B'nai B'rith. He was summarily discharged on January 5, 1968, by William A. Wexler, President of B'nai B'rith, after he had filed a libel action against the defendant who was then an officer of B'nai B'rith. Plaintiff then demanded immediate payment of an amount to cover his right to notice, severance pay, accumulated vacation and return of his contributions to the retirement fund. These payments were not made and on March 27, 1968, plaintiff initiated the instant case.

The pension money was paid in June, 1968, and the other amounts were awarded to him as a result of other litigation (Civil Action No. 2561–68). Plaintiff has been substantially unemployed since his dismissal and seeks his legal and other expenses in the prior litigation, plus a very substantial sum for loss of employment, together with punitive damages and costs of this present action. The case was tried to the Court without a jury and the parties have submitted briefs and proposed findings of fact and conclusions of law. Many of the proposed findings submitted by the parties are irrelevant to disposition of this controversy and the essential facts are set forth below.

The event that percipitated plaintiff's dismissal was his filing of a libel action[4] against defendant on December 28, 1967. This culminated a long series of disagreements between plaintiff and others in the organization. It is not disputed that defendant, who was Executive Vice-President of B'nai B'rith, had experienced difficulty working with plaintiff and had expressed irritation with or dislike for him. The feeling between the two men was mutual, and by the time of discharge, apparently intense.

The decision to discharge plaintiff was definitely made by President Wexler. The first issue presented here is whether defendant induced Wexler to take this action or whether Wexler acted solely on his own responsibility as he claims. The burden is on plaintiff to prove that defendant induced the discharge and it is a burden that plaintiff has failed to meet. The fact that defendant discussed the discharge with Wexler before it occurred and that a colloquy took place at a deposition between counsel for the parties is not sufficient to overturn the clear preponderance of the evidence that Wexler considered the libel suit the last straw in a long and disagreeable relationship between B'nai B'rith and plaintiff and was determined from the outset to fire him.

The second issue concerns payments due plaintiff following his discharge and it presents different considerations. Plaintiff was entitled to the following:

(1) $11,152.49—contribution to pension fund
(2) 20,000.00—severance pay
(3) 1,666.66—in lieu of notice
(4) 3,076.80—accumulated vacation

When the payments were not made by March, plaintiff filed suit as previously mentioned. The failure to pay item (1), which was paid in June, was the responsibility of the

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[4] This libel action, C.A. 3271–67, and a related libel action, C.A. 216–69, were both dismissed. See Memorandum Opinion of this Court dated January 15, 1971, 324 F. Supp. 660. Appellee's motion to dismiss the appeal was granted, No. 71–1295, October 5, 1971.

Chairman of the Board of Trustees of the Retirement Fund and not of defendant. The failure after explicit demand to pay items (2), (3) and (4) prior to this lawsuit as provided in the agreement between B'nai B'rith and its Headquarters Staff Association (Pl. Ex. 11), of which plaintiff was a member, was substantially the result of and was proximately caused by defendant's effective interference in the absence of Wexler who had taken personal responsibility for all phases of the matter. Defendant countermanded Wexler's specific instructions by arbitrarily directing the comptroller to withhold payment. This was done in Wexler's absence with full knowledge of Wexler's instructions and plaintiff's right to the sums as indicated above. There were no legal difficulties holding up payment at the time, although some legal questions arose later, and the Court has concluded that defendant acted out of personal pique and not by reason of any official duty imposed upon him. Defendant thus substantially interfered with plaintiff's contractual rights to notice, severance and vacation allowance which President Wexler had determined vested in plaintiff at the time of discharge. Harper & James, *The Law of Torts*, vol. 1, pp. 490, *et seq.*

Defendant denied interference and consequently never sought to justify his interference. Moreover, the fact that plaintiff behaved in an irritating and antagonistic manner following discharge does not change the nature of defendant's understandable but unjustifiable response. Under all the circumstances no malice was shown. Plaintiff is accordingly entitled to his expenses for recovering the amounts owed him, *e.g.*, $10,747, plus interest from the dates these expenses were incurred and the costs of this action. No punitive or other damages will be allowed.

On August 15, 1971, after the trial but before the submission of briefs and findings of fact, defendant died. A motion to dismiss has been filed on the ground that an action for tortious interference with contract does not survive death under the survival statute of December 23, 1963,

as interpreted in *Wander* v. *Hamburger,* 129 U. S. App. D. C. 256, 393 F.2d 365 (1968).

The statute, 12 D.C. Code 101 (1967 Edition), provides that in general rights of action will survive for or against legal representatives of a deceased party in the case. One exception is created for "tort actions for personal injuries" in which "the right of action is limited to damages for physical injury, excluding pain and suffering therefrom." *See Stone* v. *Brewster,* 130 U.S. App. D.C. 183, 399 F.2d 554 (1968).

A contract right is a property right. A tortious interference with a contract right creates an injury to property, not a "personal injury." Thus this action alleging an interference with various contracts falls within the general rule of the survival statute and not within the exception for "personal injuries." *Cf., Tyler* v. *Dixson,* 57 A.2d 648 (1948).

This result is in conformity with the common law which held that tort actions for damage to property rights survived death. 1 C.J.S. Abatement and Survival § 132. And, in part, the survival statute in the District was designed to add to, and not diminish, the classes of causes of action which survived at common law. *Stone* v. *Brewster, supra.*

The main case cited by defendant, *Wender* v. *Hamburger, supra,* is not to the contrary. In that case, a libel action, which is clearly a "tort action for personal injuries," was held not to survive the death of the defendant.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

The motion to dismiss is denied and the damages and costs here awarded will stand. Counsel for plaintiff shall submit an appropriate order within five days.

GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

November 1, 1971.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Reformulation of Questions Presented	2
Restatement of the Case	2
Argument	6
A. The Judgment of the District Court in the Predecessor Breach of Contract Action Did Not Preclude the Judgment Entered by the District Court in this Action	6
B. The Decision Below is in Harmony with the Decisions of this Court and of the Federal Courts Governing Employment Relations	8
Conclusion	12
Appendix A—Agreement between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association	1a

AUTHORITIES CITED

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Republic Steel Corporation v. *Maddox*, 379 U.S. 650 (1965) 9, 11

General Motors Corp. v. *Mendicki*, 367 Fed. 2d 66 (10th Cir. 1966) 9, 11

National Labor Relations Board v. *Granite State Joint Board*, —— U.S. ——, 34 L.Ed. 422 (1973) 10

Linn v. *United Plant Guard Workers*, 383 U.S. 53 (1966) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-908

SAUL E. JOFFES, *Petitioner*

v.

WILLIAM A. WEXLER and B'NAI B'RITH, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The Court of Appeals rendered no opinion. A copy of its judgment is attached to the Petition as Appendix B at p. 9a. The opinion of the United States District Court for the District of Columbia is set forth in Appendix A to the Petition at pp. 1a-8a and is reported in 324 F. Supp. 660.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

REFORMULATION OF QUESTIONS PRESENTED

The questions as formulated by the Petitioner, in our view, are imprecise and are insufficient. Since they tend to obscure the issues which this Court is asked to review, we have restated the questions presented in the following form:

(1) Whether relevant notices or communications, which are prepared by an employer pursuant to procedures prescribed by a collective bargaining agreement and whose distribution is limited to those with an interest in the personnel action to which they relate, may be made the subject of an action in libel.

(2) Whether there were any findings of fact in the earlier breach-of-contract action (*Joftes* v. *B'nai B'rith,* unreported, D.C. D.C. 2561-68, aff'd without opinion U.S. App. D.C. 23067, *cert. den.* 400 U.S. 964, reproduced in Appendix C to the Petition at pp. 10a-12a), companion to this case, which precluded the judgment of the Court below.

RESTATEMENT OF THE CASE

The Petition has given an argumentative account of the facts of this case.[1] Accordingly, we include in our opposition a restatement of the facts.

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[1] E.g., the Petitioner belonged to a "company" union organization (Pet., p. 3); the "Zionist oriented" administration of B'nai B'rith (Pet., p. 3); Petitioner, "obviously wearied by the three year ideological struggle with Wexler and Kaufman" (Pet., p. 4); Petitioner "having 'freely chosen to exercise his legal right to abandon the privileges of union membership'" (Pet., p. 4); vari-

This case concerns a libel action arising out of a sequence of events involving the dismissal of Petitioner under the terms of a collective bargaining agreement covering a unit of regular executive staff employees employed by Respondent B'nai B'rith in its national headquarters.

B'nai B'rith is a non-profit corporation engaged in activities of "international scope and political significance" (Pet., App. A. p. 2a), with national headquarters in Washington, D.C. Respondent Wexler was at all times pertinent to this action President of B'nai B'rith.

B'nai B'rith employed Petitioner as a regular executive employee attached to its headquarters staff. The terms and conditions of Petitioner's employment were governed by a collective bargaining agreement between B'nai B'rith and a union known as the B'nai B'rith Headquarters Staff Association. The Staff Association was recognized by this agreement "as the sole and exclusive agency for negotiating policies and conditions and other matters pertaining to personnel practices for regular executive employees . . . whether or not said employees are members of the Staff Association." (Resp., App. A, p. 1a). This collective bargaining agreement, among other things, explicitly circumscribed causes for discharge and prescribed procedures

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ous personnel "met with their lawyer . . . to . . . plan litigation strategy." (Pet., p. 5); Wexler "in a complete about-face . . . and in a patent calculated ploy to deprive Joftes of the money" (Pet., p. 5); Wexler sent Joftes an "unsolicited" letter dated February 14 (Pet., p. 5); Wexler's "perfidy" (Pet., p. 6). The list is not all inclusive. There is no support for these and other of Petitioner's similar characterizations in the decision of the District Court, based upon all material facts as to which Court found no genuine issue (See Pet., App. A, pp 1a-4a).

governing discharges and the processing of grievances and arbitrations based thereon (Resp., App. A, pp. 5a, 11a, 12a, 13a).

Respondent twice in a twelve-month period took action under the terms of this agreement to discharge Petitioner.

The first such action took place on January 6, 1967. As required by the agreement, Respondent prepared and on that date delivered to the Petitioner, a notice of discharge specifying as the reason therefor a "lack of capacity and competence" to handle his duties as an executive employee of Respondent. Copies of the notice were distributed to persons with a "job-related interest in receiving it," (Pet., App. A, p. 8a).[2]

The union thereupon advised Respondent that Petitioner had invoked the grievance procedure under the agreement and asked for a bill of particulars. Respondent responded by preparing and delivering to the distributees of the notice a clarification or "supplemental notice," dated February 20, 1967, specifying additional grounds for discharge, using the exact words of the agreement as descriptive of each such ground. The parties thereafter negotiated a "seemingly acceptable compromise" involving rescission of the notices of discharge and re-assignment of Petitioner to a different position from that which he held at the time of the discharge action (Pet., App. A, p. 2a).

Some nine months later, Petitioner brought suit against the Executive Vice President of B'nai B'rith, who signed the foregoing notices of discharge, claiming

[2] E.g., Respondent's chief executive officer, the union chief executive officer, the Chairman of the International Council (Petitioner's immediate superior), the Comptroller (Pet., App. A, p. 3a).

that the words used as grounds for discharge in those communications constituted libel *per se.*

This event precipitated Petitioner's final discharge by Respondent which this time was communicated to him by the President of B'nai B'rith, Respondent Wexler, in a letter of January 5, 1968. Petitioner thereupon made a written demand upon the Comptroller of B'nai B'rith, with carbon copies to the President and to one Rabbi Rubin, officer of the union, for sums which he claimed were owing to him under the collective bargaining agreement in consequence of the discharge action. In response to this demand, Respondent Wexler dictated a letter, dated February 14, 1968, clarifying the basis for the discharge. The letter of clarification, or supplemental notice of discharge, followed precisely the same two-step sequence as has been described above in connection with the 1967 discharge and was distributed in the same manner to persons with a "job-related" interest. The February 14, 1968 letter, like the 1967 communications relating to discharge, was made the basis for this action in libel, again based upon the words used as grounds for discharge which, like the earlier letter of February 5, 1967, did not go beyond the words used in the agreement.

The District Court found that "each of the documents at issue were contemplated by the collective bargaining agreement" (Pet., App. A, p. 5a) and that the publication of each of the documents at issue was limited to those "within the scope of its justified distribution" (Pet., App. A. p. 8a).[3]

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[3] "[W]ith the exception of Joftes' wife, who saw Wexler's letter, through no fault of defendants." (Pet., App. A, p. 8a).

ARGUMENT

A. The Judgment of the District Court in the Predecessor Breach of Contract Action Did Not Preclude the Judgment Entered by the District Court in this Action.

As we read the Petition, Petitioner in his first point represents that: (1) the decision of the District Court turned upon a "finding" that the February 14, 1968 malfeasance letter was a "notice of dismissal"; (2) the earlier breach of contract action turned on a finding that the January 5, 1968 "misconduct" letter was a "notice of dismissal"; (3) there is an inconsistency between these findings; and (4) the inconsistency should be resolved upon principles of *res judicata*.

The argument is based upon fallacious assumptions.

Neither decision turned on a finding that the communication of February 14 or the communication of January 5 constituted a "notice of dismissal" in itself or to the exclusion of other notices. Neither court had occasion to treat, or did in fact treat, these communications as conceptual forms with unique attributes. The District Court in this case simply concluded: (1) that there were no genuine issues with respect to any of the material facts, and (2) that there could be no doubt that "each of the documents at issue were contemplated by the collective bargaining agreement" (Pet., App. A, p. 5a).

It does not matter what these documents may be called. That they were contemplated by the contract as a part of the collective bargaining process, including the handling of grievances and arbitrations over discharge actions, is the critical point and that they were so contemplated "cannot be doubted." (Pet., App. A, p. 5a).

The predecessor breach of contract action (*Joftes* v. *B'nai B'rith, supra*) involved the issue of why and not of how Petitioner was discharged. The judgment in that action was limited to a determination of the reason for the discharge, measured in terms of the limiting discharge language of the collective bargaining agreement. The District Court there said quite clearly:

> "Thus, the only question in the case . . . is merely whether the filing of the law suit . . . was 'gross personal misconduct' as described in the letter of January 5, 1968, or whether it may be considered as a continuation of the 'malfeasance, misfeasance and non-feasance' which had earlier troubled the organization." (Pet., App. C, p. 12a)

The libel action, on the other hand, was not a discharge action. It did not turn on the issue of the "why" or reason for the discharge. Rather, it raised the issue whether the discharge communications of January 5 and February 14 were contemplated by the agreement and were appropriately issued thereunder. In passing upon this point, the District Court said:

> "Whether or not these claims of incompetence were just, and whether or not they were the true reasons for the discharge, each was directly related to Joftes' handling of his job and none went further than to state possible reasons for the employer's dissatisfaction with his performance.
>
> "Moreover, each letter was occasioned by a development relating to the dismissal. Rabbi Kaufman's January 6 letter was the official written notice of the 1967 discharge; his 'supplemental notice' of February 20, adding 'malfeasance, misfeasance, and nonfeasance' to the stated reasons for the dismissal, was written to clarify what appeared to be a breach of the agreement, since dismissals simply for 'incompetence' had to be pre-

ceded by a written evaluation and an opportunity for the employee to improve. . . . President Wexler's letter of February 14, 1968, was written in response to a demand by Joftes for severance pay, and the recitation of cause for the dismissal was made because the reasons for discharge controlled the employee's entitlement to severance pay under Article XVII of the agreement." (Pet., App. A, p. 6a).

B. The Decision Below is in Harmony with the Decisions of this Court and of the Federal Courts Governing Employment Relations.

As the District Court observed, there are a number of approaches to the decision in this case but each approach points in the direction of a single overriding principle which "finds ample support in the law and requires that summary judgment be entered for defendants as to each cause of action." (Pet., App. A, p. 5a). The overriding principle, well-defined by the District Court, is that an employer does not expose himself to the substantial risks and expenses of a libel action when he agrees in a collective bargaining contract with a union lawfully acting as the exclusive representative of his employees in the unit covered by the contract: (1) to surrender his otherwise unqualified right to discharge an employee without explanation; (2) to place limits upon causes for discharges; (3) to identify to his employees and to the union the contractual grounds and reasons for any given discharge; (4) to process grievances through various stages of a grievance procedure in which all aspects of personnel decisions involving discharge, including liability for payment of a range of benefits incident to discharge, may be challenged; and (5) to abide by the ultimate decision of an arbitrator if efforts to agree

upon a resolution of the grievance in the earlier stages of the grievance procedure should fail.

It is axiomatic that all members of a collective bargaining unit are bound by the terms of collective bargaining agreements between an employer and a labor organization lawfully acting as the exclusive representative of employees within the unit covered by the contract. Accordingly, each employee must be held to consent to actions required or contemplated by the agreement, including especially the preparation and publication of communications relating to discharge, without which there can be no grievance and arbitration procedure, so long as the distribution of such communications is confined to persons having "a legitimate job-related interest" in receiving intelligence of this nature (Pet., App. A, p. 8a).

The District Court recognized that of no less weight in arriving at its judgment was the policy in the federal labor law expressed in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965) that the grievance-arbitration procedures specified in collective bargaining agreements must be respected as the exclusive remedy for a cause of action remediable under the contract.

The third pillar relied upon by the District Court in support of its judgment was the principle of an unqualified privilege attaching to statements made "either by representatives of the management or by representatives of an employee at a conference or bargaining session having for its purpose the adjustment of a grievance of the employee or other peacable disposition of such grievance. . . ." (Pet., App. A, p. 7a, quoting *General Motors Corp.* v. *Mendicki,* 367 F.2d 66 (10th Cir. 1966), at p. 70).

Even if the consent rationale is singled out from the other supports relied upon by the District Court for its judgment, it is apparent that consent to abide by the terms of a collective bargaining agreement does not depend upon membership in the union. Rather, it derives from the fact of employment within the unit covered by the collective bargaining agreement negotiated by the exclusive bargaining agency acting on behalf of all employees, regardless of membership in the union.[4]

There is no conflict between this principle and the decision of this Court in *National Labor Relations Board* v. *Granite State Joint Board,* — U.S. —; 34 L.Ed. 2d 422 (1973). There the Court held that union violated Section 8(b)(1)(a) of the National Labor Relations Act, as amended, by imposing fines upon former union members for returning to work during a strike in violation of a membership resolution and by seeking judicial enforcement of the fine so levied. The decision in *Granite State* is limited to the binding effect of internal union rules of behavior upon members and ex-members. It does not even remotely touch the issue in this case involving the binding effect upon employer, union and employees alike of the terms of a collective bargaining contract, regardless of union membership.

Here, Petitioner and Respondent alike were bound by the terms of the agreement with respect to all com-

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[4] In this case, the collective bargaining agreement explicitly sets forth the status of the Staff Association as the exclusive representative of all regular executive staff employees employed in the B'nai B'rith National Headquarters "whether or not said employees are members of the Staff Association." (Resp., App. A, p. 1a) This provision simply restates the axiomatic principle of majority rule established decades ago under the National Labor Relations Act.

munications and procedures involving all aspects of the discharge and related personnel actions and claims based upon the discharge.

Causes of action based upon discharges of this nature, regardless of the forum to which they may be addressed, necessarily involve ex-employees and possibly ex-union members.

Like Petitioner in this case, plaintiffs in both *Maddox* and *Mendicki* were discharged employees. All were bound in one way or another by the collective bargaining agreement upon the basis of which they asserted their claims.

Petitioner's reliance on *Linn* v. *United Plant Guard Workers,* 383 U.S. 53 (1966), is similarly misplaced. *Linn* was a libel action for statements published in the course of a union-organizing campaign, as distinguished from statements made as here in communications contemplated by a collective bargaining agreement as the essential device for enforcing terms of the contract. In *Linn,* this Court held that the remedial provisions under the National Labor Relations Act for harmful utterances made in the circumstances of that case offered no possibility of relief for the damage suffered and that, accordingly, there was an insubstantial basis upon which a policy of federal pre-emption by the National Labor Relations Act could be predicated. Here, the considerations involved the availability of effective contractual remedies as in *Maddox* (Pet. App. A. p. 7a); the destructive effect of a contrary result on "the carefully constructed system of procedures and remedies for employment disputes" arising under collective bargaining agreements as articulated by *Mendicki* (Pet., App. A, p. 8a); and,

no less significance, the binding effect of all contemplated contractual procedures and communications upon all for whom the exclusive bargaining representative acted.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX A

AGREEMENT

between the SUPREME LODGE OF B'NAI B'RITH and the B'NAI B'RITH HEADQUARTERS STAFF ASSOCIATION

as revised December 15, 1964

Preamble

The SUPREME LODGE OF B'NAI B'RITH (hereinafter referred to as B'nai B'rith) and the B'NAI B'RITH HEADQUARTERS STAFF ASSOCIATION (hereinafter referred to as "Staff Association") agree on the following personnel practices:

ARTICLE I—*Recognition*

1. B'nai B'rith hereby recognizes the Staff Association as the sole and exclusive agency for negotiating policies and conditions, the correction of grievances and disputes, and other matters pertaining to personnel practices for regular executive employees

a. who operate out of national headquarters in Washington, D.C.;

b. who are not voting members of the Board of Governors or any national lay governing body of B'nai B'rith; and

c. whether or not said employees are members of the Staff Association; except that employees of B'nai B'rith Women and of the national office of B'nai B'rith Hillel Foundations, B'nai B'rith Youth Organization and B'nai B'rith Vocational Service are specifically excluded from provisions of this agreement.

ARTICLE II—*Use Of Facilities And Time By Employees*

1. The use of facilities in the B'nai B'rith Building by the Staff Association is authorized, subject to administrative regulations.

2. During working hours no employee shall engage in Staff Association activities on the premises of B'nai B'rith except for the purpose of conference with the employer agency, nor shall an employee engage in any activity other than the business of B'nai B'rith.

ARTICLE III—*Discrimination*

1. An employee may join or refrain from joining the Staff Association, and B'nai B'rith shall give no preferential treatment to, nor discriminate against any employee because of membership or non-membership in the Staff Association.

2. B'nai B'rith shall not encourage or discourage membership or participation in the Staff Association of any employee who is eligible to join.

3. There shall be no discrimination against a regular employee because of race, sex or marital status.

4. B'nai B'rith shall make no individual or private agreement with a regular employee in conflict with or contrary to the terms of the personnel matters covered in this Agreement, nor shall B'nai B'rith enter into any agreement in conflict with the intent of this Agreement to esablish for regular employees uniform personnel practices and conditions of employment for the matters defined in this Agreement.

ARTICLE IV—*Definitions And Conditions Of Employment*

1. B'nai B'rith has the sole right to recruit, employ, promote, transfer and dismiss any of its employees, subject to the provisions of this Agreement.

2. A *new employee,* within ten days after hiring, shall receive from B'nai B'rith a copy of this Agreement and a memorandum setting forth his duties, initial salary and other matters pertaining to his employment.

3. A *temporary employee* is one who is engaged for a period not to exceed one year. In the event a temporary employee is retained permanently in the same assignment, or one of equivalent duties, he shall be deemed to have completed his probationary period and shall be deemed a regular employee.

4. A *part-time employee* is one who is hired for less than thirty hours per week in accordance with agreed terms of employment.

5. A *regular employee* is one who is hired for thirty hours or more a week for work of a continuing nature and who has satisfactorily completed the probationary period as defined in paragraph 6 of this Article.

6. The probationary period for a regular employee shall be six months, but may be extended by mutual agreement in writing for not more than six additional months. B'nai B'rith shall inform an accepted applicant, before employment, of the length and nature of his probationary period.

a. Written notice of evaluation of performance shall be given to the employee by his immediate supervisor at the end of three months, and at the conclusion of the probationary period.

b. B'nai B'rith shall give notice in writing to a probationary employee whose probationary period is not to be completed. The notice period shall be the equivalent of one day for every two weeks of continuous employment, or fraction thereof, of the probationary employee, but not to exceed one month.

c. An employee who is retained following completion of the probationary period shall be deemed a regular employee and shall be entitled to all rights thereof, retroactive to his first day of full-time employment.

d. When a regular employee is transferred to a new assignment, arrangements shall be made for his

return to his previous assignment or equivalent thereof, within six months, if the results of the new assignment are not mutually satisfactory.

ARTICLE VI—*Seniority*

1. Seniority for a regular employee shall be computed on continuous length of service beginning from the first day of full-time employment with any national, district or regional component of B'nai B'rith. Service as an employee of an individual lodge or chapter shall be excluded.

2. Vacation as defined in Article XV and Leaves as defined in Article XIV shall be included in computing length of service.

3. Seniority is interrupted but not lost during other leaves of absence without pay.

ARTICLE VI—*Separation*

1. A regular employee released from employment because of reorganization or retrenchment shall be given two months separation notice in writing in addition to severance pay as defined in Article XVII.

2. Seniority shall be recognized as a major determining factor for continuing the employment of a regular employee whose job has been eliminated or reduced by reorganization or a reduction in force.

3. In the event it is impractical to reassign a regular employee otherwise subject to separation, B'nai B'rith will make every reasonable effort to help the separated employee find suitable employment elsewhere.

ARTICLE VII—*Dismissal*

1. A regular employee may be dismissed from employment only on the grounds of malfeasance, misfeasance, nonfeasance (including incompetence of a continuing nature), or gross personal misconduct not connected with his offi-

cial duties but of such a nature as to make his continuing employment a detriment to the purposes of B'nai B'rith.

2. a. A regular employee shall be granted one month notice of dismissal, except in cases of malfeasance.

b. In dismissals for incompetence of a continuing nature, after two years service, a regular employee shall receive two months' notice.

c. A dismissal for incompetence of a continuing nature shall be based on cumulative evidence and evaluation, including an opportunity for the employee to improve his performance prior to notice of dismissal.

d. In all cases, the notice of dismissal or evaluation shall be in writing.

3. Within the notice period, B'nai B'rith may, at its discretion, terminate the actual duties of the employee.

ARTICLE VIII—*Resignation*

1. A regular employee shall give a minimum of two months' notice of resignation.

ARTICLE IX—*Relocation*

1. A regular employee who is to be relocated, subject to mutual agreement between B'nai B'rith and himself to establish, where necessary, maximum allowances, shall be reimbursed.

a. Actual and necessary cost of transporting his family and household goods to his new location.

b. Reasonable and necessary expenses incurred in securing suitable housing.

c. Actual and necessary living expenses incurred when he is required to report to his new assignment before it is practical to complete his household move, but in no case shall these expenses exceed the travel and per diem allowance.

ARTICLE X—*Promotion*

1. B'nai B'rith shall adhere to the principle of promotion-from-within and shall give preference in filling a staff vacancy to a regular employee if his qualifications are equal to those of an outside applicant.

2. B'nai B'rith shall publicly advise all regular employees of staff vacancies, describing the nature of the duties and professional requirements, and shall invite and act on applications from employees covered by this Agreement prior to making a decision.

3. Seniority shall be a major factor in promotions.

ARTICLE XI—*Increments*

1. B'nai B'rith shall consider annually each regular employee for a salary increment.

ARTICLE XII—*Welfare Benefits*

1. *Medical and Hospitalization Plan.* A regular employee of B'nai B'rith shall, at his individual option, be covered by group major medical insurance. B'nai B'rith shall pay two-thirds and the employee one-third of the cost of the individual premium.

a. Any change in the existing medical and hospitalization plan shall be by mutual agreement of the Staff Association and B'nai B'rith.

2. *Life Insurance and Retirement Plan.* B'nai B'rith shall maintain a life insurance and retirement plan for regular employees.

a. Participation by the employee shall be at his individual option but in accord with established provisions for the exercise of this option.

b. Terms and conditions shall be periodically reviewed by B'nai B'rith in consultation with representatives of the Staff Association for the purpose of improv-

ing the retirement pension and other benefits of the plan.

ARTICLE XIII—*Holidays*

1. The following national and religious holidays shall be granted with pay to regular employees: New Year's Day; Memorial Day; Independence Day; Labor Day; Election Day (maximum of one-half day for those actually voting); Thanksgiving Day; Christmas Day; Rosh Hashona (two days); Yom Kippur; Succoth (first two and last two days); Passover (first two days and last two days); Shevuoth (two days).

a. For regular employees not stationed in Washington, D.C., legal holidays may be observed in accordance with local practice, but religious holidays shall be observed as specified in paragraphs 1 and 2 of this Article.

2. For Rosh Hashona, Yom Kippur and Passover time off will be given at 3:30 p.m. on the afternoon preceding the first day.

a. Suitable provision shall be made for employees who observe religious holidays and the Sabbath in the Orthodox tradition.

ARTICLE XIV—*Leaves*

1. *Sick leave* with pay shall be given for absence of a regular employee due to illness, injury or pregnancy; or for medical or dental treatment; or in case of quarantine. Sick leave shall accrue at the rate of one-and-one-half working days per month and is cumulative to a maximum of sixty days. If sick leave beyond the amount accumulated is required, it may be granted by the proper authority designated by B'nai B'rith.

a. When requested, a doctor's certificate shall be furnished by an employee absent on sick leave for more than two consecutive working days.

2. *Maternity leave* without pay for a period not to exceed one year shall be granted to a regular employee with two or more years of service. Such leave shall be requested at least sixty days before the last day of active duty.

3. *Emergency leave* with pay not to exceed one week may be granted to a regular employee for personal emergencies of death or serious illness in the immediate family of the employee.

4. A regular employee called for *jury duty* shall receive the difference between jury pay and his regular pay, except on days when the jury is not in session at which time the employee shall report for work.

5. A regular employee called for *military reserve training* shall receive the difference between military pay and regular pay (if the former is the lesser) for a period not to exceed two weeks in any calendar year.

6. *Military leave* without pay shall be granted to a regular employee for extended active service with the Armed Forces. He shall be entitled to return to his employment without loss of prior rights or privileges, provided he applies for reinstatement within ninety days of his completion of satisfactory service.

7. A regular employee shall have the right to apply for *leave with pay for academic study and other purposes* when such leave will, in the opinion of B'nai B'rith, be of sufficient benefit to B'nai B'rith.

ARTICLE XV—*Vacation*

1. Vacation allowance shall be granted a regular employee at the rate of one-and-two-thirds working days per month and shall be computed on a calendar year basis.

2. An employee shall be entitled to vacation accrual after three months service, retroactively, and from then on.

3. Vacation allowance which will accrue to a regular employee during a calendar year may be credited to him at

the beginning of the year. If an employee resigns from B'nai B'rith employment and is indebted for vacation taken but unearned, appropriate refund or salary deduction shall be made.

4. Vacation allowances not used may accumulate to a maximum of twenty working days, which shall be additionally available at the beginning of the calendar year; however

a. in the event the regular employee has accumulated over a period of two years or longer, more than twenty working days of vacation allowance at the beginning of a new calendar year, and his employment is terminated during that year, he shall be entitled to the accumulation in excess of twenty working days, but not to exceed forty working days.

5. Unused vacation allowance shall be taken at the time of termination of employment; but no vacation allowance shall be granted in dismissals for dishonesty, or in resignations without the prescribed notice period.

6. Vacation shall normally be taken in summer, but in any event at a time mutually agreeable to the employee and B'nai B'rith.

ARTICLE XVI—*Travel Allowance*

1. A regular employee engaged in authorized travel shall be reimbursed

a. for actual cost of rail or air fare (not to exceed air coach when available, or pullman or lower berth sleeper) or such other means of conveyance as may be applicable and appropriate.

b. for actual cost of taxi or limousine service to and from depots and airports.

c. at the rate of ten cents permile plus tolls and parking, when a privately-owned automobile is utilized for convenience of B'nai B'rith.

d. at actual cost when a publicly-rented automobile is utilized for the convenience of B'nai B'rith.

e. for the equivalent of air coach (or first-class rail fare when air flight would not be applicable) when a privately-owned automobile is utilized for the convenience of the employee.

f. for actual cost of reasonable hotel accommodations.

g. reasonable laundry valet charges for travel of five consecutive days or longer.

h. a per diem allowance of ten dollars.

1. The per diem allowance is to include 50 cents for necessary local phone calls and 75 cents for necessary local transportation (bus, subway, taxi, etc). Necessary expenditures in excess of these allowances and other miscellaneous expenditures of a regular employee in travel status, authorized and necessary and not otherwise covered by the provisions herein, shall be reimbursed at actual cost.

2. When meals are provided in kind by B'nai B'rith, or any of its components, the per diem shall be reduced as follows:

$1.50 for breakfast
$2.00 for luncheon
$4.00 for dinner

3. For purposes of computing fractional time periods, the day shall be deemed to be in four parts:

a. from 6 a.m. to 12 noon;

b. from 12 noon to 6 p.m.;

c. from 6 p.m. to 12 midnight;

d. from 12 midnight to 6 a.m.

and the fractional per diem shall be computed at $2.50 for each part of the day.

4. A regular employee not in a travel status but incurring petty cash expenses necessary to the professional performance of his assignment shall be reimbursed actual cost.

5. A regular employee engaged in foreign travel shall be reimbursed the regular per diem allowance except

a. he shall be reimbursed a special allowance not to exceed actual cost when the circumstances impose traveling costs in excess of the regular per diem.

b. Canada shall be deemed domestic travel.

6. Employees shall use proper prudence and judgment in incurring travel and petty cash expenses.

7. An employee shall have the right to draw advance funds for a specific travel assignment in a sum not to exceed the estimated cost.

ARTICLE XVII—*Severance Pay*

1. Severance pay shall be computed at the rate of three weeks' salary for each year's service up to a maximum of one year's salary and shall be paid a regular employee whose employment is terminated by

a. separation as defined in Article VI

b. disabling illness of a permanent nature, providing the disabled employee has one or more years of seniority.

c. dismissal for incompetence of a continuing nature or for gross personal misconduct, as defined in Article VII.

2. Severance pay for dismissal on the grounds of malfeasance, misfeasance, or nonfeasance other than incompetence of a continuing nature is not authorized, except that a B'nai B'rith committee composed of the President, Executive Vice President and Chairman of the Personnel Practices Committee may, at its discretion, consider terms of

dismissal for malfeasance and misfeasance in individual cases.

3. The computation of severance pay shall include prorated allowances for fractional periods of a year.

4. Severance pay shall be exclusive of unused vacation allowance or notice periods of separation or dismissal; however, unused vacation allowance shall not be considered in computing length of service for severance pay.

ARTICLE XVIII—*Grievance Procedure*

1. In the event of a grievance the party or parties involved shall have the right to be represented personally, or by the Staff Association, or by counsel.

2. The procedure for handling a grievance shall be as follows:

a. The aggrieved party (or parties) shall present his complaint to his immediate supervisor. In the event the matter is not satisfactorily settled within two weeks, then,

b. the aggrieved party (or parties) shall have the right to take up the complaint with the next higher authority, continuing his procedure up to the office of the Executive Vice President of B'nai B'rith. In the event the complaint is still not satisfactorily settled within a period of two weeks,

c. the aggrieved party (or parties) shall have the right to take up the complaint with the President of the Order, or such committee as the President may designate. In the event the complaint is not satisfactorily settled within a period of six weeks,

d. the aggrieved party (or parties) then shall have the right to submit the matter to arbitration as defined in paragraph 3 of this Article.

3. In the event a complaint or dispute is unresolved prior to arbitration the procedure shall be as follows:

a. B'nai B'rith and the Staff Association shall select an impartial arbitrator mutually agreed upon or a three-member arbitration board which shall include one member appointed by B'nai B'rith, one member appointed by the Staff Association and a third member selected by the two who shall serve as chairman.

b. The decision of the arbitrator or the majority decision of the arbitration board shall be binding upon all concerned.

4. A discharged employee who contests his dismissal as a grievance must do so within one week of receipt of written notice of dismissal. Until final adjudication of his grievance he shall be deemed a regular employee.

a. In extraordinary cases B'nai B'rith may suspend the employee, but if decision is ultimately made in the employee's favor, all compensation, leave and other privileges shall awarded retroactively to the date of his suspension.

ARTICLE XIX—*Expiration And Renewal Of Agreement*

1. This revised Agreement shall come into full force and effect as from January 1, 1965, shall remain in force for a period of one year, and shall be renewed automatically each year thereafter, unless either party gives written notice of termination or renegotiation to the other party at least ninety days prior to the expiration date.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-908

SAUL E. JOFTES, *Petitioner*

v.

WILLIAM A. WEXLER and B'NAI B'RITH, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR REHEARING

Petitioner presents his petition for a rehearing on this Court's order dated March 5, 1973, denying the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and, in support thereof, respectfully shows (all references are to the Appendix to the Petition):

Respondents fired petitioner summarily on January 5, 1968 for having filed a libel suit against the executive

vice-president of their Order. Petitioner accepted the dismissal. Some six weeks later, respondents circulated copies of an unsolicited letter addressed to petitioner in which they charged that, during his employment with B'nai B'rith, he had been guilty of some unidentified mal-, mis- and nonfeasances in discharging the duties of his office. This, until fairly recently, *circa* 1959, would have been considered an unconsented to, and if false, malicious, published libel *per se,* for which the court would make the defamer respond in damages. In older times, a defamatory remark such as this one would ordinarily have been followed by a challenge and a duel but more enlightened minds created trespass on the case as a substitute for swords and pistols and generations of courts had upheld this rule of law that, if without justification a person makes a defamatory statement concerning another person, he is responsible for the damages that he may have caused to that person.

Petitioner, as one of those of us now often looked upon contemptuously by the libertarians because we still cling to many of the ancient verities, believes that a man's reputation—his good name in his community and profession—is a very precious and valuable thing to be fought for and protected or, as Shakespeare has put it: "the immediate jewel of [his] soul", the loss of which "leaves [him] poor indeed". The question is: How shall it be protected?

Once the letter had been circulated, two—and only two—avenues for vindication were open to petitioner. Six weeks earlier his discharge and his acceptance of it had taken away the right he once had had as an employee to file a grievance proceeding. The facts and his acquiescence in the January 5 firing had made a wrongful discharge action a futile thing since he had

indeed filed the libel suit. (See p. 7a where the trial court went so completely wrong on this). Petitioner, thus, could have resorted to self-help which supposedly is frowned upon today or, as he was advised and thought, he could have his vindication in a court of law in the form of damages unless the respondents were able to convince a jury of his peers, after his "day in court", that the charges were true. To his present chagrin, he chose the latter course and filed his suit.

Respondents moved for summary judgment. Petitioner opposed on the ground that genuine issues as to material facts existed even after persistent efforts by petitioner at discovery which the trial court had halted while in process. Petitioner submitted depositions, admissions, interrogatories and affidavits to show that there were genuine issues as to the alleged facts upon which truth of the charges, preparation of the letter and the reason for its issuance as well as the extent and legitimacy of its several publications, malice, privilege and petitioner's employment status and rights as of February 14, 1968 would have to be determined. Confessedly, the trial court does not like libel suits which he characterized as "burdensome, expensive, vexatious" (p. 8a). This is more or less in keeping with a trend sponsored by the late Mr. Justice Black in *Barr* v. *Matteo* (1959) 360 U.S. 564, where, in conformance with his postulate that the First Amendment had abolished the common law action for damages for defamation, he swung an otherwise evenly divided Court to the first step in what has developed into a gradual emasculation of the common law by piecemeal amputation—judge made law. It is only a slight exaggeration to say that the court's decision in the instant case has so abrogated the common law and outlawed the

action for libel in this jurisdiction that we are now close to a completion of the full circle from the code duello to the code duello. How, now, should a conscientious advocate advise the client who has been defamed?

The trial court resolved the very material question of petitioner's employment status by a finding, against all reality, that he still had some sort of status on February 14 and used that finding as the basis for a finding that the February 14 letter had been a notice of dismissal (pp. 4a-5a). He should have left the question of status to the jury. He made an erroneous determination of the material question of why the letter had been issued. He decided the extent and legitimacy of its publications. He made findings on malice and truth (p. 5a, n. 1). While conceding that he knew of no precedent to support him, he held that respondents were operating under an absolute privilege when they circulated the letter because they were firing an employee who had consented to the libel by his membership in the Staff Association (p. 6a-7a). He said he would not "allow" petitioner to proceed with his libel suit and told him that he should have brought an action, whatever it might be, "for an unjust dismissal" (p. 7a.). An illustration of the court's erroneous findings in this case is the one made on the reason for issuing the letter. He said (p. 6a): "President Wexler's letter of February 14, 1968 was written *in response to a demand by Joftes for severance pay* * * *" and (p. 3a): "Joftes shortly thereafter [after January 5] made a written demand upon Joseph Sklover, Comptroller of B'nai B'rith, *for sums claiming to be due him under his contract*" (sic and emphasis added). This finding was basic to his conclusion that respondents were immune to suit for the libel. But in *Joftes* v. *Kaufman*, C.A. No. 768-68 (p. 13a), the same trial judge, after a

trial of the issues, found, as petitioner had contended in the instant case, that petitioner had been fired on January 5, 1968; that he had "demanded *immediate* payment of an amount to cover his right to notice, severance pay, accumulated vacation and return of his contributions to the retirement fund"; that respondent Wexler had determined then that the rights to those sums had *"vested in plaintiff at the time of discharge"* (p. 15a and emphasis added); that Wexler had given "specific instructions" to Sklover to pay petitioner (p. 15a); and that the executive vice-president, in Wexler's absence, had "substantially interfered with [petitioner's] contractual rights" to those sums. In other words, the court found in the instant case that petitioner had waited until January 16 to make his demand upon Sklover for money and that Wexler had responded to this demand with the February 14 letter when, in truth, as the court determined after he had learned all of the facts, the letter to Sklover was only a demand that the Comptroller do what respondent Wexler had ordered him to do on January 5. The court in the instant case should have left to the jury the question of why the February 14 letter had been written. Attention is called to the less than frank manner in which respondents dealt with the question on page 5 of their brief by leaving out any mention of the order Wexler had given Sklover on January 5.

The court found as a fact (p. 5a) that "each of the documents at issue [the February 14 letter] were (sic) contemplated by the collective bargaining agreement". Petitioner had disputed this on the ground that the January 5 letter and not the February 14 letter was the dismissal notice. The trial court should have left this question to the jury.

Petitioner specifically bases his request for rehearing and the issuance of the writ on two grounds:

1. There were genuine issues as to material facts and the trial court erred in making a "finding of fact" and in granting respondents' motions for summary judgment.

2. Petitioner calls upon the Court to grant the writ as an announcement that the trend toward nullification by judges of the common law on libel has been ended with a reaffirmation of the concepts of due process and fairness.

BYRON N. SCOTT
Attorney for Petitioner.

Certificate by Counsel

I, Byron N. Scott, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

BYRON N. SCOTT
Attorney for Petitioner.

I certify that prior to the filing of this petition, I have mailed a copy of it to Edward D. Friedman, Esq., attorney for respondents at his office in the District of Columbia.

BYRON N. SCOTT